STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ADEL THABET,

Defendant-Appellant.

UNPUBLISHED
March 13, 2003

No. 232231
Wayne Circuit Court
LC No. 00-006042

Before: Meter, P.J., and Jansen and Talbot, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of kidnapping, MCL 750.349, four counts of third-degree criminal sexual conduct (CSC III), MCL 750.520d(1)(a), three counts of second-degree criminal sexual conduct (CSC II), MCL 750.520c(1)(a), and one count of assault with intent to commit criminal sexual conduct (CSC) involving penetration, MCL 750.520g(1).[1] Defendant was sentenced to concurrent prison terms of fourteen to twenty-five years for each kidnapping conviction, seven to fifteen years' imprisonment for each CSC III conviction, seven to fifteen years' imprisonment for each CSC II conviction, and six to ten years' imprisonment for the assault conviction. Defendant appeals as of right. We affirm.

Defendant's convictions arise from allegations that, on May 6, 2000, at approximately 10:00 p.m., he aided and abetted codefendant Khalid Thabet[2] and a third assailant[3] in kidnapping and subsequently sexually assaulting an eleven-year-old victim and a fourteen-year-old victim over a twelve-hour period in an apartment. Defendant was the apartment's principal resident, the

[1] Defendant was originally charged with twelve offenses, one that was based on his sexual contact with an eleven-year-old victim and eleven that were based on an aiding and abetting theory. Defendant was charged with two counts of kidnapping, MCL 750.349, four counts of CSC I (sexual penetration during the commission of another felony), MCL 520b(1)(c), two counts of CSC I (sexual penetration of a person under age thirteen), MCL 750.520b(1)(a), two counts of CSC II (sexual contact with a person under age thirteen), MCL 750.520c(1)(a), one count of CSC II (sexual contact during the commission of another felony), MCL 750.520c(1)(c), and one count of assault with intent to commit CSC involving penetration.

[2] Defendant and codefendant Khalid Thabet were tried jointly.

[3] At the time of trial, the third assailant had not yet been apprehended.

codefendant had moved into the apartment days before the criminal episode, and the third assailant was staying with the defendants for a few days. The victims were released from defendant's apartment on May 7, 2000, at approximately 1:00 p.m. At trial, defendant maintained that, but for one incident of touching the eleven-year-old victim, he was merely present during the incidents.

I

Defendant first argues that the trial court erred by denying his motion for a directed verdict because, apart from one count of CSC II against the eleven-year-old victim, there was no evidence supporting his convictions of the remaining charges.[4] We disagree.

When ascertaining whether sufficient evidence was presented at trial to support a conviction, this Court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). This Court will not interfere with the trier of fact's role of determining the weight of evidence or the credibility of witnesses. *Wolfe, supra*, 440 Mich App 514. Circumstantial evidence and reasonable inferences arising from the evidence can constitute satisfactory proof of the elements of the crime. *People v Truong (After Remand)*, 218 Mich App 325, 337; 553 NW2d 692 (1996). All conflicts in the evidence must be resolved in favor of the prosecution. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997).

Although MCL 750.349 establishes several different forms of kidnapping, *People v Wesley*, 421 Mich 375, 383; 365 NW2d 692 (1984), defendant was prosecuted and convicted under the theory of secret confinement. *People v Jaffray*, 445 Mich 287, 299; 519 NW2d 108 (1994). The elements of secret confinement kidnapping are that defendant, either alone or by aiding and abetting others, (1) willfully, maliciously, and without legal authority, (2) secretly confined or imprisoned another person, (3) using force or without consent. *Jaffray, supra*, 445 Mich 305. The essence of secret confinement is "the deprivation of the assistance of others by virtue of the victim's inability to communicate [her] predicament." *Id*. at 309.

Defendant was also prosecuted under an aiding and abetting theory for six counts of CSC I under two theories, two counts of CSC II under two theories, and one count of assault with intent to commit CSC involving penetration. To prove CSC I under MCL 750.520b(1)(a), the prosecution was required to show that defendant engaged in sexual penetration[5] with another person under the age of thirteen. See *People v Hammons*, 210 Mich App 554, 557; 534 NW2d 183 (1995). To prove CSC I under MCL 750.520b(1)(c), the prosecution was required to show that "[s]exual penetration occur[ed] under circumstances involving the commission of any other

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[4] Defendant concedes that the prosecution presented sufficient evidence to support his conviction of CSC II as a result of his sexual contact with the eleven-year-old victim.

[5] Sexual penetration means, "sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body, but emission of semen is not required." MCL 750.520a(1).

felony." To prove CSC II under MCL 750.520c(1)(a), the prosecution was required to prove that a person intentionally touched the victim's genital area for sexual purposes and that the victim was under the age of thirteen at the time of the act. See *People v Piper*, 223 Mich App 642, 645; 567 NW2d 483 (1997). To prove CSC II under MCL 750.520c(1)(c), the prosecution was required to prove that defendant engaged in sexual contact during the commission of another felony. Finally, in order to prove assault with intent to commit CSC involving penetration, the prosecutor was required to show that the defendant committed (1) an assault, (2) with an improper sexual purpose or intent, (3) that the act the defendant intended to commit involved penetration, and (4) that an aggravating circumstance existed. *People v Snell*, 118 Mich App 750, 755; 325 NW2d 563 (1982).

For the challenged offenses, the prosecutor relied on an aiding and abetting theory. A person who aids or abets the commission of a crime may be convicted and punished as if he directly committed the offense. MCL 767.39. "To support a finding that a defendant aided and abetted a crime, the prosecution must show that (1) the crime charged was committed by the defendant or some other person, (2) the defendant performed acts or gave encouragement that assisted the commission of the crime, and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time he gave aid and encouragement." *People v Izarraras-Placante*, 246 Mich App 490, 496-497; 633 NW2d 18 (2001).

"Aiding and abetting" describes all forms of assistance rendered to the perpetrator of a crime and comprehends all words or deeds that might support, encourage, or incite the commission of a crime. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999); *People v Rockwell*, 188 Mich App 405, 411-412; 470 NW2d 673 (1991). "The quantum of aid or advice is immaterial as long as it had the effect of inducing the crime." *People v Lawton*, 196 Mich App 341, 352; 492 NW2d 810 (1992). Further, an aider and abettor's state of mind may be inferred from all the facts and circumstances, including a close association between the defendant and the principal, the defendant's participation in the planning or execution of the crime, and evidence of flight after the crime. *Carines, supra*, 460 Mich 758. However, a defendant's mere presence at a crime, even with knowledge that the offense is about to be committed, is not enough to make him an aider and abettor. *People v Norris*, 236 Mich App 411, 419-420; 600 NW2d 658 (1999).

Here, the evidence, viewed in a light most favorable to the prosecution, was sufficient for a rational trier of fact to conclude that defendant aided and abetted his accomplices in kidnapping and sexually assaulting the eleven-year-old victim and the fourteen-year-old victim. Specifically, the prosecution presented evidence that defendant initially persuaded the victims to get into the vehicle, smoked marijuana with them to lower their resistance, provided the location for the sexual assaults, and directed the girls to respect the driver when they asked for his help.

More particularly, the evidence showed that, at approximately 10:00 p.m., on May 6, 2000, a vehicle, in which defendant was a passenger, followed the victims, and eventually pulled alongside of them. Defendant was in the front passenger seat, the codefendant was in the backseat, and the third assailant was driving. One of the men asked the victims their ages, and defendant then asked the victims if they wanted to go for a ride. After getting into the backseat of the car, the occupants of the car smoked marijuana as they drove around Belle Isle. After leaving Belle Isle, the driver refused the victims' request to be taken to their friend's house and,

instead, drove to defendant's apartment. The driver took the victims into a hallway and pushed them into the apartment, while threatening and slapping them. There was evidence that defendant and codefendant were walking behind the driver and the victims as they were being forced into the apartment. When the driver locked the door behind the group, defendant did not say anything. There was also evidence that the victims cried and continuously asked to leave, but, on several occasions throughout the ordeal, defendant told them that they had to respect the driver.

Once inside the apartment, the driver took the victims into the bedroom, and closed the door. The driver instructed the victims to remove their clothes and, when they resisted, he slapped them and threatened to hit them. The driver then touched their vaginas and anal area, and sucked their breasts. Subsequently, the driver penetrated the fourteen-year-old victim's rectum with his penis, and stuck his finger in the eleven-year-old victim's rectum. The driver, thereafter, put on a condom and directed the victims to suck his penis, alternating one after the other. At one point, defendant entered the bedroom, and took the eleven-year-old victim into the bathroom and then into the living room. When the eleven-year-old victim tried to help the fourteen-year-old victim, defendant told her that he would throw her back into the bedroom and have the driver do the same things to her that the driver was doing to the fourteen-year-old victim. Defendant also hugged the eleven-year-old victim while in the living room.

On the following morning, the driver left the apartment. Defendant and the codefendant remained in the apartment with the victims, and told them that if they left, the driver would follow them. Defendant claimed that he did not have a key to open the door, and could not get out. Defendant took the eleven-year-old victim into the bedroom, and instructed the fourteen-year-old victim to stay in the living room with the codefendant. Once inside the bedroom, defendant directed the eleven-year-old victim to remove her clothes, and told her that if she did not do so he was going to call the driver back to do what he did previously to the victims. Defendant touched the eleven-year-old victim's vagina, and then fell asleep. During the same time, the codefendant engaged in sexual penetration with the fourteen-year-old victim in the living room.

When the victims, subsequently, asked to leave, defendant again claimed that he did not have a key. Shortly thereafter, a man came and knocked on one of the apartment windows, and defendant instructed the eleven-year-old victim not to answer it. The man managed to slide the window open, however, and spoke with defendant in Arabic. After speaking with the man, defendant left the apartment, without leaving through the front door. There was evidence that defendant later returned and unlocked the door. Viewed in a light most favorable to the prosecution, defendant's conduct before, during, and after the criminal episode was sufficient to enable a jury to find beyond a reasonable doubt that defendant assisted in the commission of the crimes with knowledge of the actors' intent. Accordingly, the trial court did not err in denying defendant's motion for a directed verdict.

II

Next, defendant argues that he is entitled to a new trial because the prosecutor improperly elicited a statement that the fourteen-year-old victim made to her mother after the alleged sexual assault. Defendant argues that the statement was inadmissible hearsay. We disagree.

Because defendant failed to object to the challenged testimony below, we review this unpreserved issue for plain error affecting defendant's substantial rights, i.e., affecting the outcome of the proceedings. *Carines, supra,* 460 Mich 763-764.

Hearsay, a statement offered to prove the truth of the matter asserted, is inadmissible at trial unless there is a specific exception allowing its introduction. See MRE 801; MRE 802; *People v Ivers*, 459 Mich 320, 331; 587 NW2d 10 (1998). The excited utterance exception permits the admission of statements that (1) arise out of a startling event, and (2) are made while the declarant was under the excitement caused by that event. See MRE 803(2), and *People v Layher*, 238 Mich App 573, 582; 607 NW2d 91 (1999), citing *People v Smith*, 456 Mich 543, 550-551; 581 NW2d 654 (1998). The focus of the excited utterance rule is the "lack of capacity to fabricate, not the lack of time to fabricate," and the relevant inquiry is one concerning "the possibility for conscious reflection." *Smith, supra,* 456 Mich 550-551. The length of time between the startling event and the statement is an important factor to consider in determining admissibility, but it is not dispositive. *Id*. Rather, the key question is whether the declarant was still under the stress of the event, and the trial court is accorded wide discretion in making that preliminary factual determination. *Id.* at 551-552; see also *Layher, supra*.

Here, defendant essentially asserts that too much time elapsed between the time of the incident and when the victim told her mother she had been raped. The evidence illustrates that the victim's statement was made after a startling event, i.e., the kidnapping and sexual assault. Thus, the question is whether the victim was still under the overwhelming influence of the event while she made the statement to her mother. *Id*. There was evidence that victim was abducted at approximately 10:00 p.m. at night, on May 6, 2000, and confined in defendant's apartment until approximately 1:00 p.m. the following day. During the fourteen-year-old victim's confinement, she and her friend were threatened and sexually assaulted several times. The victim called her mother on the evening after she was able to leave the apartment, and told her that she had been raped. The victim's mother testified that the victim was very upset and was crying and scared, which was unusual behavior for her daughter. Even though several hours passed before the victim made the statement to her mother, the evidence showed that the victim was still under the stress caused by the event.[6] Because it is not plainly apparent that the challenged testimony could not have been received successfully and correctly under MRE 803(2), defendant has failed to demonstrate plain error.

Defendant also claims that the prosecutor improperly bolstered the victim's testimony by eliciting evidence of her prior consistent statement made to her mother. Evidence of a prior consistent statement of a witness is generally not admissible as substantive evidence. MRE 801(d)(1)(B); *People v Washington*, 100 Mich App 628, 632; 300 NW2d 347 (1980). However, because the statement at issue was admissible as substantive evidence of defendant's guilt under MRE 803(2), it is irrelevant whether the statement would have also been admissible under MRE 801(d)(1)(B). Accordingly, because the prosecutor's conduct of eliciting the evidence was not

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[6] In *Smith, supra*, our Supreme Court held that a sexual-assault victim's statement, made over ten hours later in response to questioning by the victim's mother, was an excited utterance where the evidence showed that the victim "was still under the overwhelming influence of the assault."

improper, defendant has not demonstrated plain error in this regard. *Carines, supra*, 460 Mich 763; *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000).

In relation to this claim, defendant also argues that defense counsel was ineffective for failing to object to the hearsay testimony. We disagree.

Because defendant failed to make a testimonial record concerning this issue in the trial court in connection with a motion for a new trial or an evidentiary hearing, our review of this issue is limited to mistakes apparent on the record. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000). Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994); *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). To establish ineffective assistance of counsel, a defendant must show that counsel's performance was below an objective standard of reasonableness under prevailing norms and that the representation so prejudiced the defendant that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Pickens, supra*, 446 Mich 302-303; *Effinger, supra*, 212 Mich App 69.

As indicated previously, the record supports a finding that the victim's statement qualified as an excited utterance under MRE 803(2) and, thus, any objection would have been futile. Counsel is not required to make a frivolous objection, or advocate a meritless position. See *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000), and *People v Gist*, 188 Mich App 610, 613; 470 NW2d 475 (1991). Further, the victim's statement to her mother was cumulative to her trial testimony, as well as the other victim's testimony. Accordingly, defendant has failed to demonstrate that there is a reasonable probability that, but for counsel's alleged failure to lodge an objection, the result of the proceeding would have been different. *Effinger*, *supra*. Therefore, defendant is not entitled to a new trial on this basis.

III

Defendant next argues that the trial court denied him his right to present a defense by precluding evidence that the eleven-year-old victim tried to evade coming to court to testify against him. We disagree.

This Court reviews a trial court's evidentiary rulings and limitation of cross-examination for an abuse of discretion. *People v Sabin (After Remand)*, 463 Mich 43, 60; 614 NW2d 888 (2000); *People v Canter*, 197 Mich App 550, 564; 496 NW2d 336 (1992). An abuse of discretion exists when an unprejudiced person, considering the facts on which the trial court acted, would conclude there was no justification or excuse for the ruling. *People v Ullah*, 216 Mich App 669, 673; 550 NW2d 568 (1996). A decision on a close evidentiary question ordinarily cannot be an abuse of discretion. *Sabin (After Remand), supra*, 463 Mich 67.

Evidence is relevant if it has any tendency to make the existence of a fact that is of consequence to the determination of the action more or less probable than it would be without the evidence. MRE 401; *People v Crawford*, 458 Mich 376, 388-389; 582 NW2d 785 (1998). However, even if relevant, evidence may be excluded if its probative value is substantially

outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, undue delay, waste of time, or needless presentation of cumulative evidence. MRE 403.

Further, a defendant's constitutional right to present a defense and confront his accusers is secured by the right to cross-examination guaranteed by the Confrontation Clause. US Const, Am VI; Const 1963, art 1 § 20; *People v Adamski*, 198 Mich App 133, 138; 497 NW2d 546 (1993). However, the right to present a defense is not absolute. See *People v Hayes*, 421 Mich 271, 279; 364 NW2d 635 (1984); *People v Arenda*, 416 Mich 1, 8; 330 NW2d 814 (1982). A witness may be cross-examined on any matter relevant to any issue in the case, *People v Federico*, 146 Mich App 776, 793; 381 NW2d 819 (1985), but neither the Confrontation Clause nor due process confers an unlimited right to admit all relevant evidence or cross-examine on any subject. *Adamski, supra*. Rather, a court has wide latitude to impose reasonable limits on cross-examination based on concerns such as prejudice, confusion of the issues, or questioning that is only marginally relevant, among others. *Id*.; *Canter*, *supra*.

The trial court did not abuse its discretion by precluding the cross-examination of the eleven-year-old victim regarding her reluctance to come to court. Defendant sought to demonstrate that the eleven-year-old victim's unwillingness to come to court supported a finding that she had falsely accused him, and was reluctant to further perpetuate the lie. We agree with the trial court that the proffered evidence was not relevant. The fact that an eleven-year-old victim of a sexual assault is reluctant to testify does not have a tendency to make it more likely that she was perpetuating a lie. To the contrary, the proffered evidence could have easily supported an inference that the victim was being truthful and was apprehensive or fearful of facing her assailants. In short, defendant has failed to persuasively demonstrate how evidence relating to the eleven-year-old sexual assault victim's reluctance to come to court shows that she fabricated the charges against him, without more information. MRE 401. As such, the inference defendant is trying to draw between the victim's reluctance to come to court and the victim being untruthful is too tenuous and may have confused the issues. MRE 403.

We also reject defendant's claim that the trial court's evidentiary ruling deprived him of his constitutional right to present a defense. The trial court's ruling did not amount to a blanket exclusion of all evidence challenging the victim's credibility. In fact, defense counsel cross-examined the victim at length. Moreover, contrary to defendant's implication, evidentiary rulings do not ordinarily rise to the level of a constitutional violation. See *Crane v Kentucky*, 476 US 683, 690; 106 S Ct 2142; 90 L Ed 2d 636, 645 (1986). Therefore, we are not persuaded that the trial court abused its discretion by precluding the challenged evidence.

IV

Defendant next argues that he is entitled to resentencing because the trial court improperly scored offense variables (OV) 3 and 7 for his kidnapping convictions. We disagree.

Because the kidnapping offense occurred in May 2000, the legislative sentencing guidelines apply. MCL 769.34(2); *People v Reynolds*, 240 Mich App 250, 253; 611 NW2d 316 (2000). "A sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score." *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). A scoring decision "for which there is any evidence in support will be upheld." *People v Elliott*, 215 Mich App 259, 260; 544 NW2d 748 (1996). If

a sentencing issue requires the application of the instructions in the legislative sentencing guidelines, it is a question of law reviewed by this Court de novo. *People v Libbett*, 251 Mich App 353, 365; 650 NW2d 407 (2002).

With regard to OV 3, MCL 777.33(1)(d) provides that ten points are to be assessed if "[b]odily injury requiring medical treatment occurred to the victim." Here, there was evidence that the fourteen-year-old victim suffered bruising during the assault, and tested positive for a sexually transmitted disease. The fact that the victim may not have obtained medical treatment is inconsequential. MCL 777.33(3) provides that the phrase " 'requiring medical treatment' refers to the necessity for treatment and not the victim's success in obtaining treatment." Accordingly, because there was evidence to support the trial court's assessment of ten points for OV 3, there was no abuse of discretion.

With regard to OV 7 (aggravated physical abuse), as it relates to this case, MCL 777.37(1)(a) directs a score of fifty points if the victim was "treated with terrorism, sadism, torture, or excessive brutality." At the time of defendant's 2000 offense, terrorism was defined in MCL 777.37(2)(a) as "conduct designed to substantially increase the fear and anxiety a victim suffers during the offense."[7] Sadism "means conduct that subjects a victim to extreme or prolonged pain or humiliation and is inflicted to produce suffering or for the offender's gratification." MCL 777.37(3). Here, defendant and his accomplices smoked marijuana with the child victims before forcing them into defendant's apartment, where defendant and his accomplices held the victims captive for more than twelve hours. During the captivity, the victims were threatened, repeatedly sexually assaulted, and denied their repeated requests to leave. Under such circumstances, the trial court did not abuse its discretion by assessing fifty points under OV 7.[8] Accordingly, defendant is not entitled to resentencing on this basis.

V

Defendant's final claim is that he is entitled to resentencing because defense counsel was ineffective for failing to timely object to the trial court's scoring of certain offense variables, thereby failing to preserve his sentencing issue for appeal.

Because defendant failed to make a testimonial record in the trial court in connection with a motion for a new trial or an evidentiary hearing, this Court's review of this issue is limited to mistakes apparent on the record. *Ginther*, *supra*; *Sabin (On Second Remand)*, *supra*.

This Court granted defendant's motion to remand allowing him to move for resentencing. On remand, defendant moved for resentencing, and challenged the trial court's scoring of the disputed offense variables. Because any prejudice resulting from defense counsel's failure to

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[7] This statute was amended in 2002 to remove the "terrorism" language. See 137 PA 2002.

[8] We reject defendant's suggestion that he was entitled to a score of zero points for OV 7 simply because the codefendant was not assessed any points for OV 7. As indicated previously, the evidence supported a score of fifty points for OV 7 and, in multiple offense cases, a trial court is not statutorily bound to assess the same erroneous score for a defendant that has been erroneously assessed to a codefendant. See, e.g., *Libbett, supra*.

object was cured, there is not a reasonable probability that, but for counsel's inaction, the result of the proceeding would have been different. *Effinger*, *supra*. Therefore, defendant is not entitled to resentencing on this basis.

Affirmed.

/s/ Patrick M. Meter
/s/ Kathleen Jansen
/s/ Michael J. Talbot